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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION AND JAMES B. EDWARDS, SECRETARY OF ENERGY,
Appellants,

v.

THE STATE OF MISSISSIPPI, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OF AMICI CURIAE UTILITIES: HOUSTON LIGHTING & POWER COMPANY, IDAHO POWER COMPANY, IOWA POWER AND LIGHT COMPANY, IOWA PUBLIC SERVICE COMPANY, THE MONTANA POWER COMPANY, and OKLAHOMA GAS AND ELECTRIC COMPANY IN SUPPORT OF APPELLEES

Of Counsel:

WILLIAM R. BROWN
General Counsel
Houston Lighting & Power Company
3000 One Shell Plaza
Houston, Texas 77002

PAUL L. JAUREGUI
General Counsel
Idaho Power Company
Post Office Box 70
Boise, Idaho 83707

[Additional Counsel Listed Inside Cover]

R. GORDON GOOCH*
JOHN P. MATHIS
J. PATRICK BERRY
HUGH HEWITT
BAKER & BOTTS
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 457-5500

Attorneys for Amici Utilities:
Houston Lighting & Power Company, Idaho Power Company, Iowa Power and Light Company, Iowa Public Service Company, Kansas Gas and Electric Company, The Montana Power Company, and Oklahoma Gas and Electric Company

*Counsel of Record

ADCOMP, INC. ARLINGTON, VIRGINIA (703) 841-0858

LYNN VORBRICH
Vice President and
General Counsel
Iowa Power and Light
Company
Post Office Box 657
Des Moines, Iowa 50303

IRA E. DELK
Associate General Counsel
Iowa Public Service
Company
Post Office Box 778
Sioux City, Iowa 51102

JAMES F. HAINES
Kansas Gas and Electric
Company
Post Office Box 208
Wichita, Kansas 67201

ROBERT E. SULLIVAN
Vice President and
General Counsel
The Montana Power Company
Post Office Box 1338
Butte, Montana 59701

H. DUANE STRATTON
Senior Vice President—Law
Oklahoma Gas and Electric
Company
Post Office Box 321
Oklahoma City, Oklahoma 73101

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INTEREST OF AMICI CURIAE

This *amici curiae* brief is filed on behalf of the several utilities listed above and described below. For the Court's convenience, they shall be referred to as "Amici Utilities."

Houston Lighting & Power Company, based in Houston, Texas, is an investor-owned electric utility that serves

nearly one-fourth of the population of Texas. The Company's facilities and its service area are located exclusively within the State. Its rates are regulated both by the Texas Public Utility Commission and the incorporated municipalities that it serves.

Idaho Power Company is an investor-owned electric utility based in Boise, Idaho, that owns and operates facilities in five Western States: Idaho, Oregon, Nevada, Wyoming and Montana. Since the Company provides electricity for sale in Idaho, Oregon and Nevada, its retail rates are regulated by the state public utility commissions of those three States.

Iowa Power and Light Company is an investor-owned combination gas and electric utility company based in Des Moines, Iowa. It provides gas and electric service to central and southwestern Iowa. Its retail rates are regulated by the Iowa State Commerce Commission.

Iowa Public Service Company, based in Sioux City, Iowa, is also an investor-owned combination gas and electric utility. It provides gas and electric service in Iowa and South Dakota. Its retail rates are regulated by the Iowa State Commerce Commission and the South Dakota Public Service Commission.

Kansas Gas and Electric Company, based in Wichita, Kansas, is an investor-owned electric utility that provides electric service to central and southeastern Kansas. Its rates are regulated by the State Corporation Commission of Kansas.

The Montana Power Company, based in Butte, Montana, is an investor-owned combination gas and electric utility that provides service to the western two-thirds of the State of Montana. Its rates are regulated by the Montana Public Service Commission.

Oklahoma Gas and Electric Company, based in Oklahoma City, Oklahoma, is an investor-owned electric utility that provides electricity for sale in Oklahoma and western Arkansas. Its retail rates are regulated by the Oklahoma Corporation Commission and the Arkansas Public Service Commission.

Because certain provisions of the Public Utility Regulatory Policies Act (PURPA) order the several state regulatory authorities listed above to take certain actions affecting the electric utilities subject to their jurisdiction, Amici Utilities have a direct and vital interest in any judicial proceeding interpreting those provisions, especially an interpretation declaring them unconstitutional. Written consents from all parties to the filing of this brief are on file with the Clerk.

STATEMENT

As a general proposition, PURPA requires state regulatory authorities to undertake certain actions with respect to certain matters within a certain time. For example, six separate federal ratemaking standards are established in Section 111 of PURPA.[1] All six standards must be considered for adoption by state regulatory authorities; this consideration must begin within two years of enactment of the statute and must be completed within three years.[2] State authorities must comply with detailed federal rules when undertaking their consideration[3] and must file annual reports to the Secretary of the Department of Energy

[1] 16 U.S.C. (Supp. III) § 2621.

[2] 16 U.S.C. (Supp. III) § 2622(b). An additional five standards are established not for consideration, but for adoption within two years of enactment of the statute unless a state affirmatively chooses not to do so. 16 U.S.C. (Supp. III) § 2623.

[3] 16 U.S.C. (Supp. III) § 2625.

(DOE) summarizing the "determinations made and actions taken with respect to each such standard on a utility-by-utility basis." [4]

PURPA grants certain persons an almost unrestricted right to intervene in any state ratemaking proceeding regardless of state law.[5] Actions to enforce this right of intervention may be brought in federal court.[6] In addition, any person, including the Secretary of DOE, who participated in a state proceeding considering a federal standard is authorized to obtain review in a state court of any determination made with respect to a particular utility.[7] The Secretary is granted the additional right to "participate as an amicus curiae in any review by any court of an action" arising under the provisions of the statute creating federal standards or arising under the provisions establishing intervention and judicial review.[8]

Finally, Section 210 of PURPA requires the Federal Energy Regulatory Commission (FERC) to promulgate rules to encourage energy cogeneration and small power

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[4] 16 U.S.C. (Supp. III) § 2626(a).

[5] 16 U.S.C. (Supp. III) § 2631. Such intervention must be at least to initiate or to participate in the consideration of any of the federal standards or "other concepts which contribute to the achievement of the purposes of this chapter." § 2631(a). Since the broad purposes of Title I range from encouraging equitable rates for electric consumers to encouraging electric utilities' conservation of energy and efficient use of resources and facilities, 16 U.S.C. (Supp. III) § 2611, it is difficult to imagine many concepts that could not be characterized as contributing to the achievement of these purposes.

[6] 16 U.S.C. (Supp. III) § 2633(b). The Secretary of DOE may proceed directly to federal court; other persons must first seek relief from a state court.

[7] 16 U.S.C. (Supp. III) § 2633(c)(1).

[8] 16 U.S.C. (Supp. III) § 2633(c)(3).

production.[9] Within one year after any rule is promulgated or revised, every state regulatory authority shall "implement such rule (or revised rule) for each electric utility for which it has ratemaking authority." [10] If the FERC does not enforce this requirement, private parties may bring an enforcement action in federal court.[11]

Neither the wisdom of the various standards established by PURPA nor the purposes that the statute was designed to achieve are before the Court. What is before the Court is whether the federal standards and rules are required to be implemented by the States.

PURPA is no mere collection of suggestions—no simple study offered to the States as a useful tool in their independent deliberations. Rather PURPA's language is the language of command, its dictates those of a higher authority to a lesser one. It is a direct and substantial federal intrusion into what have traditionally been areas of state concern, areas that have been recognized by this Court.[12] It is an intrusion that makes burdensome demands upon the States. The question for the Court is whether those demands are constitutional.

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[9] 16 U.S.C. (Supp. III) § 824a-3.

[10] 16 U.S.C. (Supp. III) § 824a-3(f)(1). Although the currently effective regulations of the FERC provide options for state implementation of the federal rules, 18 C.F.R. § 292.401(a), there is no option not to implement the federal rules. And it is the FERC—not the state regulatory authority—that determines whether the option actually exercised by a particular state adequately implements the federal rule.

[11] 16 U.S.C. (Supp. III) § 824a-3(h)(2).

[12] *See, e.g.*, FPC v. Southern California Edison Co., 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed. 2d 638 (1964) (since there is a bright line easily ascertained between state and federal jurisdiction, case-by-case analysis is unnecessary).

The answer to this question raises profound implications not only for the state regulatory authorities upon whom these demands are made, but for the utilities—and their customers—upon whom the impact of these demands is ultimately imposed. It is for this reason, and to further "the public interest in the administration of justice," *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U.S. 575, 581, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447, 1453 (1946), that Amici Utilities have chosen to participate in this proceeding. To facilitate the Court's consideration, Amici Utilities will focus on the single issue of whether PURPA's regulation of the States violates the Tenth Amendment to the Constitution.

ARGUMENT

PURPA's Regulation of the States Violates the Tenth Amendment to the Constitution As Interpreted by Directly-Applicable Precedents of this Court

The chief instrument for expansion of federal power at the expense of state authority has been the Commerce Clause.[13] Through the use of this clause, the federal government established its ability to implement programs of national scope in the areas of economics [14] and civil rights.[15] This expansion of federal power may be perceived as a

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[13] Perez v. United States, 402 U.S. 146, 91 S.Ct. 1357, 28 L.Ed. 2d 686 (1971); Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed. 2d 290 (1964); Cleveland v. United States, 329 U.S. 14, 67 S.Ct. 13, 91 L.Ed. 12 (1946); Polish National Alliance v. NLRB, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944); Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).

[14] Fry v. United States, 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed. 2d 363 (1975); United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941); National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

[15] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed. 2d 258 (1964).

necessary modernization of federalism, but it has not been without its costs. One cost is a perception that the States have a diminished stature, only a formalistic sovereignty. Left unchecked, that perception, as embodied in congressional lawmaking, could very well have, in the words of Justice Douglas, "devour[ed] the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." [16]

This Court's 1976 decision in *National League of Cities* v. *Usery* [17] restored the cornerstone of federalism and announced to all that there are indeed constitutional limits on the congressional exercise of authority under the Commerce Clause. In light of the Court's unanimous decision on June 15, 1981, in *Hodel* v. *Virginia Surface Mining and Reclamation Association, Inc.*[18] that reaffirmed its decision in *National League of Cities,* there can be no doubt today that certain provisions of PURPA constitute a form of federal regulation of the States prohibited by the Tenth Amendment to the Constitution.[19]

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[16] Maryland v. Wirtz, 392 U.S. 183, 205, 88 S.Ct. 2017, 2028, 20 L.Ed. 2d 1020, 1036 (1968) (Douglas, J., dissenting).

[17] 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 2d 245 (1976).

[18] —— U.S. ——, 101 S.Ct. 2352, 69 L.Ed. 2d 1 (1981).

[19] These provisions are Title I, codified at 16 U.S.C. (Supp. III) §§ 2611-2644 and at 42 U.S.C. (Supp. III) §§ 6801-6806; Title III, codified at 15 U.S.C. (Supp. III) §§ 3201-3211; and Section 210 of Title II, codified at 16 U.S.C. (Supp. III) § 824a-3. To the extent that these provisions require the States to take certain actions to implement the federal mandates of the statute, they should be declared unconstitutional. They should be contrasted with other provisions of the statute, *e.g.*, Sections 202 through 204, that amend the Federal Power Act, 16 U.S.C. § 791a *et seq.*, by adding three new statutory provisions affecting federal—not state—regulatory authorities. 16 U.S.C. (Supp. III) §§ 824i-k. No question whatsoever is raised about the constitutionality of those provisions. Unless expressly noted otherwise, references herein to PURPA are limited to Title I, Title III, and Section 210 of Title II as they apply to the States.

In *National League of Cities,* in striking down the 1974 amendments to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.,* in which the Congress had sought to impose federal minimum wage and maximum hour standards on almost all public employees of state governments, the Court declared:

> It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.[20]

Thus, the Tenth Amendment as a constitutional force was vindicated in *National League of Cities* after nearly four decades of neglect[21] and further vindicated in *Hodel.*

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[20] 426 U.S. at 845, 96 S.Ct. at 2471, 49 L.Ed. 2d at 253.

[21] Distinguished scholars, such as Professor Tribe, are willing to acknowledge that "[i]f states are to have any real meaning, Congress must . . . be prevented from acting in ways that would leave a state formally intact but functionally a gutted shell." Tribe, Laurence H., *Unravelling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services,* 90 Harvard Law Review 1065, 1071 (1977). Although Professor Tribe is hard pressed to develop a coherent description of the States' independent role in the federal system, he recognizes that some areas are more apt to be within the penumbra of *National League of Cities* than others. He observes, "[I]t is in the regulatory area that the traditional justifications for a federal system—the intrinsic as well as instrumental values of diversity and experimentation which can be achieved through decentralized decision-making—find their greatest validity." *Id.* at 1075.

In *Hodel*, the Court was called upon to consider the constitutionality of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. III) § 1201 *et seq.* In the Court's words:

> [The Act] establishes a two stage program for the regulation of surface coal mining, an initial, or interim regulatory phase, and a subsequent, permanent phase. The interim program mandates immediate promulgation and federal enforcement of some of the Act's environmental protection performance standards, complemented by continuing state regulation. Under the permanent phase, a regulatory program is to be adopted for each State, mandating compliance with the full panoply of federal performance standards, with enforcement responsibility lying with either the State or Federal Government.[22]

The Court unanimously upheld the constitutionality of this regulatory scheme. In doing so, however, the Court was careful to observe:

> [T]he States are not compelled to enforce the [federal] steep-slope standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever. If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.[23]

The Court thus reaffirmed the holding of *National League of Cities* that there are limits beyond which the federal government may not pass in its attempts to achieve a na-

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[22] —— U.S. at ——, 101 S.Ct. at 2356, 69 L.Ed. 2d at 11.

[23] —— U.S. at ——, 101 S.Ct. at 2366, 69 L.Ed. 2d at 23-24.

tional regulatory policy. The Court detailed the test of *National League of Cities*, by which the constitutionality of federal intrusion into state affairs is to be determined, in the following language:

> It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.*, at 854, 96 S.Ct., at 2475. Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." *Id.*, at 845, 96 S.Ct., at 2471. And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions." *Id.*, at 852, 96 S.Ct., at 2472.[34]

The constitutionality of PURPA must thus be judged by determining whether the statute meets each of these three tests and by further determining whether there are any overriding considerations of federal interest.[35]

Let us step back at this time to review the various categories of state activities that the Court has recognized. First, there are those activities which partake of an entrepreneurial quality, such as the operation of a railroad,[36]

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[34] *Id.* The Court observed in a footnote to the language quoted in the text that "[d]emonstrating that these three requirements are met does not, however, guarantee that a Tenth Amendment challenge to congressional commerce power action will succeed. There are situations in which the nature of the federal interest advanced may be such that it justifies State submission." *Id.*, note 29.

[35] See note 24, *supra.*

[36] United States v. California, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936). *See also,* Parden v. Terminal Railway of the Alabama State Docks Department, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 2d 233 (1964).

or the sale of natural resources,[27] which can and have been constitutionally regulated in part by the federal government.

Second, there are activities of the States, which while sovereign in their character, such as the control of airspace once was, can nevertheless be displaced by preemptive federal regulation.[28] The States, when such a displacement occurs, are in effect moved aside entirely from the exercise of regulatory authority; the federal government completely replaces state control.

The third category comprises those activities which are neither entrepreneurial, nor yet the subject of federal preemption. Regarding policy towards these activities, and assuming a broad reach of the Commerce Clause, the federal government has two choices. It can choose to leave intact the existing state regulatory structure, or it can attempt to displace entirely the state's control. If Congress attempts the latter approach, it cannot displace in halves. It cannot command the state regulatory authorities to do A, B, and C in pursuit of federal objectives X, Y and Z. To allow that would effectively terminate the independent existence of the States. In his dissent in *New York* v. *United States*,[29] Justice Douglas characterized the danger of such a development as follows:

> The notion that the sovereign position of the States must find its protection in the will of a transient ma-

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[27] New York v. United States, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946).

[28] Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed. 2d 547 (1973); *see also* Jones v. Rath Packing Co., 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604 (1977); Perez v. Cambell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed. 2d 233 (1971); Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 67 S.Ct. 1026, 91 L.Ed. 1234 (1947); Hines v. Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

> jority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the Nation outside the field of legislative controversy.[30]

One can argue that even less-than-dramatic attempts to control state activities from Washington must be resisted as an unconstitutional imposition of federal authority upon the independence of the state governments. The basis for this argument is found in *United States* v. *Baltimore & O. Railroad Co.*[31] where the Court observed of the States that "[i]f they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any

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[29] 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326 (1946).

[30] 326 U.S. at 594, 66 S.Ct. at 320, 90 L.Ed. at 340.

In a sense, the Tenth Amendment is the check and balance on federal action which complements the check and balance on state action provided by the Commerce Clause itself when state action constitutes a burden on interstate commerce or when the State attempts to regulate interstate commerce. Thus, the federal government is constrained by the Tenth Amendment and the state government is constrained by the Commerce Clause. In this case, there is no claim that state regulation of utility rates constitutes a burden on interstate commerce, nor that the States are attempting to regulate interstate commerce.

Until now, the issue was one of preemption. Utilities have long lived under a system of dual regulation, with the Congress determining the reach of federal regulation of interstate commerce. PURPA now abandons dual regulation and seeks to require the States to implement federal standards.

[31] 17 Wall. 322, 21 L.Ed. 597 (1873).

interference is permitted." [32] As it is with taxation, so it is with regulation. If certain federal regulatory burdens on the States are permitted, the power to regulate could quickly be abused.

The regulation of "States as States" must be distinguished from the displacement of States from a particular exercise of regulatory power. Displacement was the issue in *Hodel*. There, the federal plan imposed no burdens on the States which the States could not avoid should they choose to do so. That the States were indeed given a choice was crucial to the Court's decision. If any State cared to assign its money, time, and manpower to surface mining regulation, it could join the federal program and play by the federal rules. If a State chose not to join, not one demand would be imposed. To repeat the Court's conclusion, "If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, *the full regulatory burden will be borne by the Federal Government. Thus there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.*" [33]

With PURPA, no such conclusion can be drawn. The public utility commissions of fifty states, their members, their staffs, their monies, and their time are all "commandeered" by PURPA's directives. Since there is no State choice to "opt-out" of the regulatory program, the States

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[32] 17 Wall. at 327, 21 L.Ed. at 599, quoted in New York v. United States, 326 U.S. 572, 592-593, 66 S.Ct. 310, 319, 90 L.Ed. 326, 339 (1946) (Douglas, J., dissenting).

[33] —— U.S. at ——, 101 S.Ct. at 2366, 69 L.Ed. 2d at 23-24 (emphasis added).

themselves are regulated by PURPA "as States." The statute thus meets the first test of *Hodel*.[34]

PURPA also meets the second test of *Hodel* that "the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' "[35] There can be no doubt that the regulation of retail rates and services that are charged and provided by electric utilities operating within its borders is a traditional state function. The Appellants' conclusion to the contrary because there is concurrent federal and state jurisdiction over public utilities [36] fails to recognize the separate nature of each government's jurisdiction. The jurisdiction of the FERC is carefully cir-

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[34] Since there is no reference in the Appellants' brief to the first test of *Hoael*, apparently they concede that PURPA regulates the "States as States." In this connection, it is instructive to quote the Federal Government's own description of what PURPA requires of the States:

> To be sure, the statute in suit places certain regulatory responsibilities upon the states. Some of the provisions at issue do more than "allow" state regulation. Portions of Titles I and II require state regulatory authorities to "consider" whether or not to adopt and implement certain regulatory standards; the state commissions must adhere to certain procedural requirements in considering these standards, must permit the Secretary of Energy to participate in the proceedings, and must report to the Secretary their progress in the consideration process. Section 210(f)(1) requires the state authorities to implement the Federal Energy Regulatory Commission's rules concerning transactions between cogenerators and electric utilities; the Commission is empowered under Section 210(h)(2) to enforce this statutory responsibility in federal court. Brief for Appellants at 28-29 (footnote omitted).

In view of this description, it is not surprising that the Appellants chose not to discuss whether PURPA regulates the "States as States."

[35] —— U.S. at ——, 101 S.Ct. at 2366, 69 L.Ed. 2d at 23.

[36] Brief for Appellants at 31.

cumscribed by Section 201 of the Federal Power Act.[37] It is limited to the interstate transmission of energy and to the sale of energy at wholesale in interstate commerce. The States retain full authority to regulate intrastate retail rates of utilities. And, of course, it is the retail rates of electric utilities that are the subject of Title I of PURPA. Because PURPA directs state regulators of electric utilities to take certain actions involving their retail rates, there can be no serious suggestion that PURPA does not "address matters that are indisputably 'attributes of state sovereignty.' " [38]

Appellants state that "[i]t is difficult to appreciate why the statute should be more vulnerable because Congress chose a less radical course out of concern that preemptive federal regulation would constitute undue interference with

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[37] 16 U.S.C. (Supp. III) § 824. Subsection (b)(1) provides:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

[38] *Hodel*, —— U.S. at ——, 101 S.Ct. at 2366, 69 L.Ed. 2d at 23. Please note that the Court's test requires the federal regulation merely to "address [these state] matters;" there is no requirement that the plenary authority of the States to make determinations essential to their separate and independent existence be abrogated. *Compare* Brief for Appellants at 31.

the traditional authority of state regulatory commissions over retail utility ratemaking." Brief for Appellants at 31-32. Whether Congress has the constitutional power under the Commerce Clause to preempt all State regulation in this area is a question not before this Court. For whatever reason, Congress did not choose to preempt State authority.[39] Its choice instead to "commandeer" the regulatory authorities and courts of the States to carry out a federal program places the statute squarely within the proscriptions of *Hodel*.

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[39] One witness suggested the obvious reason that Congress should not preempt state authority: federal—and ultimately congressional—accountability.

> The State utility commissions are not merely a nuisance, Mr. Chairman. If the State utility regulatory commissions did not exist, they would need to be invented. They take responsibility for problems of local rates and services which the Federal Government should not shoulder, and which it is incapable—and I say this after a long experience on the Federal Power Commission—which it is incapable of shouldering effectively.
>
> They take the onus for local service conditions and for the vast number of rate increases which inflation and OPEC have made inevitable. Under the proposed legislation, the State agencies would be in a position to disclaim responsibility, because they would be creatures of a Federal bureaucracy, operating under the dictates of the Federal legislation and rulemaking by the Department of Energy.
>
> Whatever prestige and respect they now enjoy, they would lose. I ask the members of the subcommittee to consider whether it is desirable that the Congress place directly on a Washington agency the responsibility for every retail rate increase in the future, and for every failure of service.

Comments of Joseph C. Swidler, a former chairman of both the Federal Power Commission and the New York Public Service Commission, before the Senate Subcommittee on Energy Conservation and Regulation, *Public Utility Rate Proposals of President Carter's Energy Program: Hearings on S. 122, S. 1300, S. 1363, 1364, S. 1469 (Part E), Before the Subcomm. on Energy Conservation and Regulation of the Senate Comm. on Energy and Natural Resources*, 95th Cong., 1st Sess. (Pt. 1) 371 (1977) (hereinafter referred to as *"Senate Hearings"*).

With respect to the third test of *Hodel*, had Congress chosen merely to advise the state regulatory authorities of what Congress believed to be the best regulatory approach, that is, had Congress offered counsel rather than commands, PURPA probably would not have attracted any constitutional challenge. But by burdening the state commissions with federal agendas that *have* to be considered, by establishing federal timetables that *have* to be kept, and in the case of Section 210, by promulgating federal regulations that *have* to be enforced, it is unquestionably apparent "that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' " [40]

State government budgets are, of course, finite. So too are the funds with which state regulatory authorities must operate. Federal regulation of the States that forces them to conduct investigations and hearings they would not otherwise have conducted, or to implement federal regulations which the States would not have promulgated, inevitably forces some allocation of funds to those pursuits.[41]

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[40] —— U.S. at ——, 101 S.Ct. at 2366, 69 L.Ed. 2d at 23. The flexibility of the federal regulations promulgated under Section 210 that is touted in the Appellants' Brief at page 41 is irrelevant to the constitutionality of the underlying statutory provision. The regulations can always be changed to make them less flexible; indeed, the language of Section 210 expressly contemplates that the regulations will be revised.

[41] It is a zero-sum transfer. If the State had, pre-PURPA, intended an agenda of X items with a budget of Y dollars, and PURPA commands an agenda of A items requiring an expenditure of B dollars, then the state commission's autonomy is circumscribed to the extent that it can only attempt an agenda of X-A length, and do so with a budget of Y-B dollars. Of course, as A approaches X in scope, or B approaches Y in amount, the State autonomy diminishes. When A = X or B = Y, the State's independence is terminated.

Likewise, if a state commission is ordered to address 365 days worth of standards in a single year, it will not address any standard on its own initiative.

What is astounding about PURPA, perhaps more so than any other fact, is the lack of any evidence in the legislative history accompanying the statute of the size of the burden being imposed upon the states. Without regard to budgets, or States' tax bases, or state commission resources, Congress laid down uniform standards and uniform procedures that require the expenditure of State funds to comply with the federal statute. While PURPA purports to supply financial assistance to the States, there is no guarantee of such funding and, of course, there is no way the federal government can add hours to the regulatory day. While the loss of initiative, time, and independence does not admit of easy translation into budget figures, it too is there in every State and for every state commission. PURPA certainly impairs the States' ability to structure their regulation of those utilities subject to their jurisdiction. Indeed, "impair" is too mild a word.

Although each of the three tests outlined in *Hodel* for declaring a statute unconstitutional is met by PURPA, that does not end the matter. According to the Court, there may be "situations in which the nature of the federal interest advanced may be such that it justifies State submission." [42] Such an interest was present in *Fry* v. *United States*,[43] a case discussed by the Court in *National League of Cities*.

Fry involved a challenge to the Economic Stabilization Act of 1970 (ESA), a challenge that was rebuffed by the Court for a number of reasons, as explained by

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[42] —— U.S. at ——, 101 S.Ct. at 2366, 69 L.Ed. 2d at 23, note 29.

[43] 421 U.S. 542, 95 S.Ct. 1792, 44 L.Ed. 2d 363 (1975).

its opinion in *National League of Cities*. First, the ESA "was occasioned by an extremely serious problem which endangered the well-being of all component parts of our federal system and which only collective action by the National Government might forestall." [44] No similar claim can be made for PURPA. Indeed, the very flexibility and independence that the Appellants attribute to individual States under the regulatory scheme of PURPA argue against the need for "collective action" by the federal government.[45]

Second, the ESA was "carefully drafted so as not to interfere with the States' freedom beyond a very limited, specific period of time." [46] No one can assert that claim with respect to PURPA; its right of intervention, for example, is a mandate etched in federal stone.

Third, "the ESA displaced no state choices as to how governmental operations should be structured, nor did it force the States to remake such choices themselves. Instead, it merely required that the wage scales and employment relationships which the States themselves had chosen be maintained during the period of the emergency." [47] That is, state choices were honored, and simply extended.

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[44] 426 U.S. at 853, 96 S.Ct. at 2475, 49 L.Ed. 2d at 258.

[45] There is the more fundamental question of whether PURPA actually would result in any additional individual initiatives at the state level. As the Chairman of the Texas Public Utility Commission testified:

> In summary, it appears that most of the more desirable goals of the bills are rapidly being implemented by state commissions due to public pressure and participation in current rate cases, and that the two-tiered regulation proposed in the current bills is a poor solution to the balance of the problems raised, and will substantially increase the cost of electricity to the consumer. *Senate Hearings* at 435.

[46] 426 U.S. at 853, 96 S.Ct. at 2475, 49 L.Ed. 2d at 258.

[47] *Id.*

That process preserved at least some degree of accountability—the States after all had already implemented their policy. With PURPA, policy initiative is taken from the States although policy responsibility is not. The States are "commandeered" to implement the federal program.

"Finally, the Economic Stabilization Act operated to reduce the pressures upon state budgets rather than increase them." [48] PURPA, of course, achieves the opposite result.[49]

Because PURPA regulates the States as States in an area that possesses the attributes of state sovereignty, because compliance with that regulation impairs the ability of the States "to structure integral operations in areas of traditional functions," and because there is no federal interest involved to justify State submission to the federal regulatory scheme, the provisions of the statute as they apply to the States [50] should be declared unconstitutional.

CONCLUSION

The decision of the district court should be affirmed.

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[48] *Id.*

[49] See note 41, *supra*. The precise budgetary impact, unfortunately, was never determined by the Congress.

[50] See note 19, *supra*.

Respectfully submitted,

Of Counsel:

WILLIAM R. BROWN
General Counsel
Houston Lighting & Power Company
3000 One Shell Plaza
Houston, Texas 77002

PAUL L. JAUREGUI
General Counsel
Idaho Power Company
Post Office Box 70
Boise, Idaho 83707

LYNN VORBRICH
Vice President and General Counsel
Iowa Power and Light Company
Post Office Box 657
Des Moines, Iowa 50303

IRA E. DELK
Associate General Counsel
Iowa Public Service Company
Post Office Box 778
Sioux City, Iowa 51102

JAMES F. HAINES
Kansas Gas and Electric Company
Post Office Box 208
Wichita, Kansas 67201

ROBERT E. SULLIVAN
Vice President and General Counsel
The Montana Power Company
Post Office Box 1338
Butte, Montana 59701

H. DUANE STRATTON
Senior Vice President—Law
Oklahoma Gas and Electric Company
Post Office Box 321
Oklahoma City, Oklahoma 73101

/s/ R. Gordon Gooch

R. GORDON GOOCH
JOHN P. MATHIS
J. PATRICK BERRY
HUGH HEWITT
BAKER & BOTTS
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 457-5500

Attorneys for Amici Utilities:
Houston Lighting & Power Company,
Idaho Power Company,
Iowa Power and Light Company,
Iowa Public Service Company,
Kansas Gas and Electric Company,
The Montana Power Company, and
Oklahoma Gas and Electric Company

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that, pursuant to Rule 28 of the Rules of this Court, I have this day caused to be served, by first-class mail postage prepaid, three (3) copies of the foregoing Brief of Amici Curiae Utilities in Support of Appellees upon the following counsel for the parties to this proceeding: Rex E. Lee, Solicitor General, Department of Justice, Washington, D.C. 20530; Charles A. Moore, General Counsel, Federal Energy Regulatory Commission, Washington, D.C. 20426; Alex Alston, Jr., P.O. Drawer 1532, Jackson, MS 39205; Hiram C. Eastland, Jr., 100 Court Street, Indianola, MS 38751; Joshua Green, P.O. Box 1666, Jackson, MS 39205; and James K. Child, Jr., P.O. Box 651, Jackson, MS 39205.

/s/ R. Gordon Gooch

R. GORDON GOOCH

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Washington, D.C.